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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

EWING KING, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this cause on July 29, 1965.

OPINION BELOW

The opinion of the Court of Appeals is reported at 349 F. 2d 20 and is printed as Appendix A, of co-petitioner Hoffa, No. 794 this term.

JURISDICTION

The judgment of the Court of Appeals, Appendix B, *infra*, was entered on July 29, 1965. Petition for rehearing was timely filed and was denied on October 7, 1965. Extension of the time within which to petition for certiorari was granted on October 18, 1965 by Mr. Justice Potter Stewart extending petitioner's time for filing of this writ to the 6th day of December, 1965. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Must a court in light of the Massiah-Escobedo doctrine, exclude from evidence testimony of inculpatory statements made by defendants prior to arrest but after the inquiry had focused on them, when such statements were made to a paid government secret agent surreptitiously and deceptively placed in defendant's midst for the purpose of obtaining such admissions.

2. Whether the trial court (and the Sixth Circuit Court of Appeals) properly carved out a new exception to the rule that the prosecutor may not either in cross-examination, or in summation call to the jury's attention the fact that a defendant had invoked the Fifth Amendment in a prior proceeding by ruling that a mistrial was not required under the circumstances here, notwithstanding

(a) the prosecutor's cross-examination of petitioner concerning his invoking the Fifth Amendment privilege in a prior and connected proceeding;

(b) the prosecutor's cross-examination of a co-defendant as to whether he had told petitioner to invoke the Fifth Amendment privilege; and

(c) the prosecutor's statement in final argument to the jury that the petitioner had invoked the Fifth Amendment privilege.

3. Can a trial court create, as it did here, a limitation of the right of cross-examination and impeachment of the main government witness (Partin) and indulge in a course of over-protection of such witness effectively preventing the discrediting of such witness by the court's rulings, including

(a) the denial of an opportunity to cross-examine Partin with respect to recordings of telephone conversations with a co-defendant,

(b) the refusal to permit the witness, Reynolds, to testify that Partin had attempted to suborn perjurious testimony from him to corroborate Partin,

(c) the exclusion of the testimony of Mrs. Partin, and of Sol Fox, both of whom had been subpoenaed by the defense.

(d) the overruling of motions for mistrial and to strike the testimony of Government witnesses where F.B.I. agents had deliberately destroyed their original notes of interviews with such witnesses;

(e) the refusal to order production of a Government agent's notes on an informer Government witness's reports to such agent; and

(f) the refusal to order production of Government reports for the purpose of determining what Government evidence was the fruit of the inter-

ception and recording of telephone conversations between a co-defendant and Government informer Partin.

(g) the refusal to give a cautionary instruction as to the testimony of informer Partin and instead instructing the jury that a witness is presumed to testify truthfully.

The foregoing Questions are discussed in this Petition as reasons for granting the Writ. On the Questions following, numbered 4 through 17, Petitioner adopts the Statements of the Case and the Reasons for Granting the Writ which are advanced by Co-Petitioners Hoffa, Parks and Campbell in their Petitions filed in this term and respectively numbered , and , this term. If the Writ be granted as to any such questions, Petitioner reserves argument on the merits of any such questions on which certiorari is granted, and if the writ be granted without limitation, Petitioner reserves argument on the merits in respect of all questions raised.

4. Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one criminal trial so violated the Fourth, Fifth and Sixth Amendments that suppression of such evidence is required in a subsequent trial on a different charge?

5. Whether petitioner was denied a fair and impartial trial as guaranteed by the Fifth and Sixth Amendments by reason of:

(a) The Court's refusal to postpone the trial in Chattanooga because of continuous prejudicial publicity, even though the same Court, three weeks

earlier, had found in Nashville that substantially identical publicity made a fair trial for petitioner impossible.

(b) the prejudicial effect upon the jury of the Government's constant guarding of the jury and Government witnesses by an extraordinary number of Marshals.

6. Whether Petitioner was deprived of a fair trial by the erroneous admission and retention of highly prejudicial evidence, (including a transcript of a trial judge's statements in a former prosecution against co-defendant Hoffa), in support of the counts on which petitioner was convicted and without according him his constitutional rights of confrontation and cross-examination.

7. Whether the indictment of petitioner was invalid by reason of: (a) the delegation of the Jury Commission's duties of grand jury selection to non-official "suggestors" (consisting primarily of bankers, Postmasters, and State Court officials, and not including any wage earner, manual laborer, or representative of organized labor) and the Jury Commission's blanket acceptance of the persons supplied by the "suggestors" without any investigation or examination by the Jury Commission to determine whether such persons were qualified or constituted a cross-section of the community; (b) the trial court's refusal to grant petitioner a hearing to prove improper delegation of the duties of the Jury Commission in selecting the grand jury, and the systematic exclusion of elements of the community from the grand jury venire; and (c) the failure of the Court in voir dire examination to inquire whether the members of the Grand Jury panel were

biased against petitioner because of prejudicial publicity against him relating to the impending Grand Jury investigation.

8. Whether a Government agent's hearsay testimony of the alleged knowledge of a grand jury witness, who refuses to testify on the claim of Fifth Amendment privilege, constitutes probable cause for indictment.

9. Whether an accused is deprived of a fair trial:

(a) When jury instructions to apply the law of conspiracy are repeatedly given throughout a trial from which the conspiracy count has been severed on a judicial finding of prejudice; and

(b) When the trial judge abandons to the jury his function of determining the existence of *aliunde* evidence of conspiracy in admitting the declarations of alleged co-conspirators against a non-present alleged conspirator.

10. Whether an accused is deprived of a fair trial by the prosecutor's statements in final argument to the jury:

(a) That another accused's consultation with counsel and participation in his own trial indicates guilt; and

(b) That the prosecutor personally believes the accused to be guilty.

11. Whether Petitioner was denied a fair trial because admitted Government surveillance conducted prior to and during trial engendered such fear in Petitioner and his counsel as to deny him effective assistance of counsel and to impair his right of private consultation with counsel.

12. Whether it was prejudicial error to deny severance for trial of the four substantive counts either prior to or during the trial.

13. Whether the indictment was insufficient because it charged co-defendants with aiding and abetting, without stating in any way how, where or through whom they aided and abetted.

14. Whether the court committed prejudicial error in refusing to disclose to the defense for impeachment purposes the Grand Jury testimony of the key Government witness.

15. Whether the evidence was sufficient to sustain the conviction.

16. Whether the trial court committed prejudicial error in denying a hearing to determine whether or not the petit jury was chosen in such a manner as to exclude cognizable elements of the community.

17. Whether the testimony of Government witness Partin should have been suppressed on the ground that it was paid for by the Government in violation of 18 U.S.C. 201(h).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 1503, Title 18, U.S.C. provides in pertinent part:

> "Whoever corruptly, * * * endeavors to influence, intimidate, or impede any * * * petit juror * * * in the discharge of his duty * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both."

2. Section 2, Title 18, U.S.C., provides in pertinent part:

> "Whoever * * * aids, abets, counsels, commands induces, or procures [the commission of an offense against the United States] is punishable as a principal."

3. United States Constitution, Amendment IV provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

4. United States Constitution, Amendment V provides in part:

> "* * * nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

5. United States Constitution, Amendment VI provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Preliminary Statement

From October 22 to December 23, 1962, James R. Hoffa was tried in Federal Court at Nashville, Tennessee, on a two-count information (hereinafter referred to as the Test Fleet case) charging him with violation of the Taft-Hartley Act (II 584a-590a). (Roman numerals preceding page numbers refer to volume number of Defendants' Appendix).

The trial ended with a hung jury (II 591a). During the course of the trial, juror Mrs. Paschal, another juror Fields, and a venireman Tippens, were excused (II 589a, IV 1963a). On May 9, 1963, Hoffa was indicted on five counts: Count I charged him with conspiring with the defendants named in the substantive counts to endeavor to influence, intimidate and impede petit jurors Tippens, Fields and Paschal and other unnamed jurors; in Count II Hoffa as aider to defendant Medlin was charged with seeking to tamper with juror Tippens; In Count III Hoffa was charged with aiding Parks and Campbell in tampering with juror Fields; Count IV charged Hoffa and one Dorfman with aiding one Tweel in seeking to induce one Dallas Hall to attempt to tamper with jurors, and in Count V, Hoffa was charged with aiding and abetting petitioner's endeavors to influence Mrs. Paschal.

The conspiracy count (I) was severed for trial (I 15a, 199a) and the case was tried in Chattanooga, Tennessee,[1] only on the substantive counts. Petitioner and Hoffa were convicted on Count V; Hoffa and co-defendants Parks and Campbell were convicted on Count III (VII 3291a-3293a).

Factually, Petitioner was charged with attempting to tamper with the juror, Mrs. Paschal. Oscar Pitts, a member of a Teamster local in Nashville of which petitioner was president, testified that he spoke with petitioner on October 27, 1962, regarding a possible promotion for Mrs. Paschal's husband, a Tennessee

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[1] The trial was transferred to Chattanooga upon defendant's motion (based on the "atmosphere" in Nashville). Medlin did not ask for a transfer and was not tried in the instant case (R. 26a). Hoffa was acquitted by the Court on Count II and all defendants were acquitted by the jury on Count IV (I 243a; VII 3292a).

state patrolman, (II 1004a-1010a). By this time agents of the F.B.I. were conducting a surveillance of King and saw him go to Pitts' house, (II 962a). On November 17, pursuant to pre-arrangement, Pitts, Paschal and King met on the "river road" and (according to Paschal's testimony) King asked him whether he would talk to his wife, (II 1002a, 1003a, 1006a, III 1102a). Although Paschal finally said that he would, (III 1103a), he never did speak to his wife, (III 1104a). Other than evidence corroborating the fact that the river road meeting took place—which was never denied by petitioner—the only evidence adduced with respect to this count were the inculpatory statements of the informer Partin (which are detailed hereinafter). King denied that he asked or intended that Paschal speak to his wife, (V 2324-28a, 2334a).

(1) THE TESTIMONY OF PARTIN AS TO INCRIMINATING STATEMENTS MADY BY PETITIONER AND HOFFA IN THE ABSENCE OF COUNSEL MADE TO HIM WHILE HE WAS SECRETLY ACTING AS AN AGENT OF THE GOVERNMENT

A short time before the trial in the Test Fleet case began, Edward Grady Partin, a Teamster official of a Louisiana local, initiated telephone discussions with Hoffa which ultimately led to Partin's coming to Nashville; and spending, during the course of the Test Fleet trial, a great deal of time in the hotel quarters rented by Hoffa for himself and his attorneys. (III. 1178a-1179a, 1228a, 1230a, 1354a, 1357a-1361a, 1368a, 1371a, 1382-3a, 1398a, 1401a, 1404a, 1459a, 1464a).

Prior to calling Hoffa, Partin was in jail in Louisiana on a state kidnapping charge. Through the state District Attorney's office, he made contact with various Department of Justice personnel actively en-

gaged in the Hoffa investigation, (IV 1721-22a, 2040a, 2041a, V 2392a, VI 2685a), particularly Walter Sheridan, an investigator, who was assisting, if not directing, the prosecution in the Test Fleet case, (III 1291a, 1293a; V 2430a; VI 2991a). Although Partin claimed Hoffa invited him to join him—which Hoffa disputed contending Partin begged Hoffa's permission to come to Nashville—it was eventually established that Partin twice telephoned Hoffa (the taped calls are in evidence) with a member of the state District Attorney's office present, and asked if he could see Hoffa in Nashville on October 22 when the Test Fleet trial was to begin, (Ex. 215; VI 2822a; Ex. 216; VI 2826a). After thus making arrangements to meet Hoffa, he was released from custody expressly to act as a Federal informer, (III 1203a, 1296a; IV 2068a; VII 3096a). Partin was then under Federal indictment on 26 charges of embezzlement (case is untried and adjourned without date at the present time), and in state court for manslaughter (likewise untried), perjury (dismissed), and assault (directed acquittal), (VI 2623a, 2642a-2643a, 2694a-2697a, 2829a-2832a). In addition, the Federal government has failed to press a tax claim, (V 2506a).

It is conceded that during the entire course of the Test Fleet trial Partin reported to Walter Sheridan daily as to activities in the "Hoffa camp". On October 22, the first day of the Test Fleet trial, Partin gave a detailed report to Sheridan indicating extensive and intensive efforts by defendants to "reach a juror." *He testified to inculpatory statements made to him by Hoffa with respect to jury tampering made on October 22 (III 1353a, 1360a); October 23 (III 1361a, 1364a); October 25 (III 1366a, 1369a; IV 1628-29a, this*

conversation was clearly initiated by Partin); October 30 (III 1382a) and November 7 (III 1393a-1394a).

Partin testified to inculpatory statements made to him by the Petitioner with respect to jury tampering on October 26 (III 1371a, 1375a, 1376a); October 30 (III 1385a); November 5 (III 1391a); November 7 (III 1395-96a, IV 1697a); November 14 (III 1402-03a); and November 19 (III 1407-08a). Hoffa and King categorically denied all the statements attributed by Partin to them.

In addition to the inculpatory statements testified to by Partin, (all of which he said were made in the absence of legal counsel), there was testimony that Partin reported daily to Sheridan (III 1213a-1298a, 1465a); that Partin participated and associated with; and intruded upon, conferences between Hoffa and his counsel in the defense preparations, (III 1253a, 1335a), and that information of events taking place in the defense councils was imparted by him to the prosecutive team and used by the prosecution tactically in the Test Fleet trial, (III 1208a, 1224a, 1230a, 1235a, 1240a, 1257-63a, 1301a, 1302a, 1314a, 1342-3a, 1383a, 1393a).

(2) PROSECUTION REFERENCES TO PETITIONER'S USE OF THE FIFTH AMENDMENT

The government's case on Count V is that petitioner King, aided and abetted by Hoffa, attempted to influence a petit juror in the Test Fleet case through her husband, James M. Paschal (I 71a), by offering Paschal, a state highway patrolman, a promotion if he would "talk" to his wife. King denied that he asked or intended that Paschal speak to Mrs. Paschal, admit-

ting, however, that he offered to aid Paschal in obtaining a promotion (V 2324-28a, 2334a).

On December 6, 1962, Judge Miller, presiding at the Test Fleet trial, held a closed hearing, following which he removed Mrs. Paschal from the jury in that case. Paschal and King were called into the hearing (II 589a; III 1105a, 1147a; V 2383a; VI 2775a).

In the present case, King testified as to his appearance at the December 6 hearing in Nashville. His testimony (V 2330a):

> "Q. When you went into the courtroom, did you testify at this hearing? A. No, sir, I didn't.
>
> "Q. Tell the Court and jury why you didn't testify at that hearing. A. Well, upon entering the courtroom, it most certainly being new to me, never being on the witness stand for any reason, and the way the Judge explained to me what my rights were and anything that I would say might be used against me I felt that Judge Miller, knowing the gentleman, was suggesting to me that I did not have to testify and that I shouldn't to protect my own rights and I didn't testify."

This was the only reference in King's direct testimony to his appearance at the hearing on December 6, 1962. *At no time did petitioner refer as such to the Fifth Amendment.*

On cross-examination, King was asked if he did not "take the Fifth Amendment" before Judge Miller. An objection to this question was sustained, but mistrial motions on behalf of all the defendants were denied (V 2384a-85a).

Later, Hoffa was asked on cross-examination if King did not "take the Fifth Amendment" in the hearing

before Judge Miller. Objection to the question was sustained, but a motion for a mistrial was denied (VI 2778a-79a). The prosecution then asked Hoffa if he had signalled King to "take the Fifth Amendment" before Judge Miller. Hoffa answered in the negative; following which an objection was sustained, but again a mistrial motion was denied (VI 2780a-82a). At this point, prosecutor Hooker injected, "Well, the end of the mystery was that King never answered."

Ignoring the foregoing rulings, prosecutor Hooker, in rebuttal summation, argued that King "took the Fifth Amendment;"

> "Mr. Hooker: . . . I wouldn't be permitted to remind you of this except for the fact that he brought it up himself through his own counsel and in the sanctity of the Judge's chambers or in this session there at Nashville, which the public was excluded from, when this was brought up by Judge Miller in the presence of the Defendant King, according to his own statement in this very courtroom he took the Fifth Amendment and declined to answer.
>
> "Mr. Schiffer: Your Honor, at this point I move for a mistrial because Mr. Hooker is now injecting something on a constitutional basis which the Courts have ruled he dare not touch upon as to any defendant taking his constitutional rights and I accordingly move for a mistrial. It is highly prejudicial.
>
> "Mr. Berke: If your Honor please, under all the authorities and Mr. Hooker apparently doesn't know the rule on it—
>
> "The Court: (Interposing) Well—
>
> "Mr. Brown: (Interposing) Not only that, Your Honor, but on behalf of the Defendant King he did not say he took the Fifth Amendment. I want

that clear your Honor. It is not in this record he said he took the Fifth Amendment.

"Mr. Berke: It is improper for counsel—

"The Court: (Interposing) Overrule the motion for a mistrial.

"Mr. Branstetter: May all the defendants have the benefit of the mistrial motion?

"The Court: Yes. Disregard the argument of counsel in that respect. Proceed, gentlemen. Stay within the record.

"Mr. Hooker: Well, I will express it this way and I want to be in deference to his Honor's ruling, there is no proof in the record that he made any answer."

The Court of Appeals held (App. A):

"We find no prejudice in the Prosecutor's reference to Appellant King having taken the Fifth Amendment at the Test-Fleet trial. King, in his direct testimony, indicated that he did resort to his privilege not to testify. He thus injected the subject into the case. In any event, the Court instructed the jury to disregard it."

(3) THE OVERPROTECTION OF THE INFORMER BY THE COURT AND PROSECUTOR

(a) Curtailment of Cross-Examination of Partin

At the beginning of Partin's cross-examination he refused to answer various questions concerning the circumstances of his becoming a government informer, stating that the questions were not related to the case on trial, (III 1195a-1198a, 1534a-1538a) and at first the court permitted him virtually unlimited discretion in this respect (III 1197a-1198a, 1536a-1537a). Then, at the request of government counsel, the court con-

ducted a secret hearing without the jury (III 1538a) and it developed that Partin had, while in jail, reported that Hoffa had threatened to kill Attorney General Kennedy (III 1540a). The court instructed Partin not to testify to anything concerning the alleged threat and limited his cross-examination to promises made to Partin in conversations with government agents only after the time that he had begun discussing the possibility with government agents of his becoming an informer (III 1541a-1550a; IV 1633a). Thereafter, Partin from time to time refused to answer questions on cross-examination. These refusals were sustained by the court on Partin's representation that his answers would relate to the forbidden area, even though there was nothing on the face of the question to indicate that this was so. Nor did the court require that the answers be supplied to the court, outside the jury's hearing, as a check on the accuracy of Partin's representations. Thus Partin was permitted to determine for himself what questions he need not answer. (III 1564a, 1585a; IV 1633a, 1685a, 1740a, 1749a-1750a).

Further the court curtailed cross-examination of Partin as to who accompanied him to Chattanooga, with whom he was staying (IV 1644a-1645a), where he was staying, and whether he was in custody of, or being guarded by U.S. Marshal (IV 1703a-1707a). There were also other areas where the cross-examination was curtailed (IV 1697a-1698a, 1701a-1702a).

Throughout Partin's cross-examination, he was nonresponsive, and hostile, (See e.g., III 1225a-1227a, 1235a, 1505a-1512a, 1514a, 1515a-1518a, 1523a-1526a, 1532a, 1575a, 1576a, 1587a; IV 1594a, 1596a, 1597a,

1600a, 1601a, 1613a, 1615a, 1630a, 1631a, 1645a, 1665a, 1699a, 1764a), feigned a bad memory on impeaching matters (See e.g., III 1505a-1512a, 1515a-1518a, 1532a), and was evasive and argumentative (See e.g., III 1225a-1227a, 1235a, 1506a, 1509a, 1511a, 1514a-1518a, 1523a-1526a). The court failed and refused to require him to give responsive answers (III 1529a, 1573a; IV 1602a, 1603a, 1624a, 1652a, 1655a, 1672a, 1689a, 1690a, 1691a, 1693a, 1694a-1695a, 1699a, 1710a-1711a, 1718a, 1764a, 1769a, 1771a), saying that "the witness has a right to answer in the way that he feels it should be answered" (IV 1691a).

Partin was also evasive and argumentative on matters relating to his activities with respect to informing on petitioner (III 1575a-1576a, 1587a; IV 1594a, 1596a, 1597a, 1600a-1601a, 1613a, 1615a, 1630a-1631a, 1645a, 1665a, 1699a, 1764a).

(b) The Exclusion of Testimony Impeaching Partin

(1) The Exclusion of Testimony of William Reynolds

The defense sought to introduce testimony of William Reynolds to the effect that six months before the trial, Partin asked Reynolds to testify that Hoffa had offered him $10,000.00 if he could get to a juror in order to corroborate Partin's proposed testimony at the trial; that Partin also stated he had been promised by agents of the government that charges against Partin would be dropped if he testified against Hoffa; that "it is either Jimmy's neck or my neck and it ain't going to be my neck." Partin also complained that "there was quite a bit of money involved." When Reynolds told Partin that he (Reynolds) believed he had not even been in Nashville in 1962, Partin stated

that this was not a problem because Reynolds would not be punished for perjury committed in testifying for the government. Reynolds indignantly refused Partin's proposal. (Typewritten Trial Transcript pp. 6665, 6697-6702).

The trial court excluded the proposed testimony in toto, for reasons which were not stated (V 2537a-38a).

(2) The Exclusion of the Testimony of Sol Fox

Sol Fox was called to testify (V 2165a-2167a) at the instance of defendant-petitioner Parks. Fox identified himself as a resident of Puerto Rico, engaged in the real estate business in the San Juan Hotel. He was then asked whether he had made a report to the F.B.I. about government witness Partin, and he replied that he had made such a report. At this point the government counsel objected, and when pressed by defense counsel for the grounds of the objection, government counsel asked for a voir dire and the court excused the jury from the courtroom. The court inquired of defense counsel what the purpose of the examination of this witness was (V 2166a-2167a), and counsel stated:

> "Mr. Schiffer: The purpose of this witness is to show that Ed Partin called Mr. Fox, this witness here, in Puerto Rico to endeavor to enlist his aid in securing ships to carry arms to Fidel Castro in the end of 1963 into 1964. Correction, your Honor, 1962 into 1963. And that the FBI knew, the government knew that their star witness in this case was violating the laws of the United States at the time. He wanted a trade with the dictator in Cuba, Fidel Castro, and I want to be able to show that this type of evidence in and of itself is suffcient to discredit the credibility of the govern-

ment's star witness, Ed Partin, as committing a treasonable act against the United States with the knowledge of the representatives of the government of the United States because of his testimony here *that was part of the payment he was receiving for his testimony in addition to the monies they gave Partin's wife and other considerations.*

* * * * * * * * *

"Mr. Neal: Your Honor, this is clearly, clearly, clearly impermissible testimony. Your Honor permitted these people to scratch and claw a man's background.

"The Court: Well, is that it, you have stated generally the scope of the examination?

"Mr. Schiffer: Generally, your Honor, that is the scope of the testimony.

"The Court: I sustain the objection."

(3) The Exclusion of the Testimony of Mrs. Partin

Mrs. Partin was called as a defense witness (V 2498a, *et seq.*) to testify that her husband told her in the presence of a third party in the year 1960 that he was carrying on any adulterous relationship with another woman, and was a drug addict, totally irresponsible for his own actions. When Mrs. Partin signed a statement that she did not wish to testify "against" her husband, the court ruled; (V 2501a):

"All right, gentlemen, it is the opinion of the Court that on the basis both of the offer of proof on this witness and on the basis of the privilege claimed that the testimony of the witness would not be competent or admissible."

(c) The Transcriptions of Partin's Telephone Conversations With Hoffa

There was direct conflict in the testimony as to Partin's coming to Nashville. Partin claimed Hoffa requested him to come as an aide to Hoffa and for Hoffa's benefit (III 1178a, 1219a, 1581a). Hoffa claimed Partin had telephoned and insisted that he must see Hoffa (VI 2729a). If Hoffa invited Partin, it would make Partin's testimony that Hoffa confided in him, and indeed planned to use him in "tampering" the more likely (III 1353a, 1364a), while Hoffa's version, if credited, would tend to substantiate his denial of Partin's testimony that Hoffa spoke to him of jury tampering.

When Partin's direct testimony was concluded, the defense demanded production of his statements under the Jencks Act, 18 U.S. Code 3500. One statement, a document which had been submitted in camera to Judge Miller at the Nashville trial was thereupon delivered (III 1469-70a).

After Partin had left the stand and the government had rested its case, the defense discovered that the government had tape recordings of two telephone conversations between Partin and Hoffa *in which Partin's visit to Nashville had been arranged.* These tape recordings and/or transcriptions of the recordings had been delivered to the trial judge by the prosecution under seal, without disclosure of the contents to the defense (IV 1966-67a, 2010a, 2016-19a, V 2400-01a, 2403-07a). The recordings revealed, contrary to Partin's testimony and in accord with Hoffa's, that Partin had indeed insistently invited himself to Nashville for reasons of his own, and that Hoffa had merely ac-

quiesced. (VI 2821-28a.)[2] The recordings were made by Partin and a Louisiana Assistant District Attorney and delivered to the Department of Justice promptly. There can be no question but that government counsel were aware of the contents of the recordings and of the falsity of Partin's testimony when he claimed he came to Nashville at Hoffa's invitation. However, until the very moment of actual disclosure that the transcriptions had been deposited with the court, the prosecution vehemently denied the existence of any telephone call tape recordings.

Nonetheless the court refused to permit the recall of Partin for further cross-examination (IV 1968a), and thereafter ruled that the transcriptions were not producible under the Jencks Act (V 2408a). Subsequently the court made these transcriptions available (VI 2667-68a) although denying defense motions to strike Partin's testimony, and for mistrial, on the ground that the production came too late. The transcriptions later were read to the jury (VI 2821-28a).

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[2] Oct. 8, 1962 (excerpt) "Partin: . . . I got a bonding company and all. What I was thinking, Jimmy, after I get this thing straightened out today and tomorrow and everything if you get an opportunity or something, I would like to get with you and talk with you and talk this thing out.

Hoffa: Well, I'll be here all week." (Ex. 215) (VI 2822a).

Oct. 18, 1962 (excerpt) "Partin: I hate to interrupt you, Jim, but I need to talk to you on—.

Hoffa: Yes.

Partin: . . . when can I see you? You said you would be there on the 22nd in Nashville. What is the best day to come?" (Ex. 216) (VI 2826a).

(d) Refusal of a Cautionary Instruction as to Informers

The defense requested instructions cautioning the jury specifically with respect to the testimony of Partin. See Requests Nos. 50 and 52 (I 263a-264a) and Requests Nos. O, R, S, T, U, V, W, A4, 46, 48, 54, 57, 101 (I 251a-255a, 258a, 261a, 262a, 264a, 265a and 274a). Request Nos. 50 and 52 suggested to the jury that they view Partin's testimony with suspicion and caution. The trial court denied the requests and gave no instruction specifically relating either to the credibility of Partin or abstractly to the credibility of an informer. Indeed, to the contrary, the court instructed that "a witness is presumed to speak the truth" (VII 3165a).

(4 et seq.) Incorporation of Matters Set Forth in Petitions Concurrently Filed

Petitioner incorporates herein by reference the statement of the case and facts set forth in the petitions for a writ of certiorari filed concurrently herewith by his co-defendants in the Chattanooga trial, to wit, Petitioners James R. Hoffa, Larry Campbell and Thomas Ewing Parks. Such statements of the case are made in the petitions of such other petitioners with reference to the reasons for the granting of the writ of certiorari set forth in those other petitions. If incorporated herein in full and not by reference, such statements would not materially differ from those set forth in the petitions of such other petitioners and, therefore, in the interest of brevity, they are incorporated by reference rather than set out at length.

REASONS FOR GRANTING THE PETITION

(1) THE TESTIMONY OF PARTIN AS TO THE INCRIMINATING STATEMENTS MADE BY PETITIONER AND HOFFA TO HIM IN THE ABSENCE OF COUNSEL AND WHILE PARTIN WAS SECRETLY ACTING AS AN AGENT OF THE GOVERNMENT VIOLATES THE FOURTH (SEARCH AND SEIZURE), FIFTH (SELF-INCRIMINATION) AND SIXTH RIGHT TO COUNSEL) AMENDMENTS.

This case affords a forum to this court to clarify important considerations which have been the subject of much controversy and speculation since *Massiah* and *Escobedo*. *Most important would be a clarified resolution of the questions (a) whether, and when, a prior arrest or detention*[3] *is a requirement for the right enunciated, i.e., that "earliest moment" at which the right to counsel attaches; and (b) to what extent the focus of suspicion on a suspect required by Escobedo must be sharpened before the constitutional right emerges.*[4]

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[3] In a very recent case, *People* v. *Furnish*, decided by the Supreme Court of California on November 12, 1965, 34 LW 2263, there was raised the question of the effect of the *Eccobedo* case on pre-arrest confessions. The court held that a pre-arrest confession, after police investigation reached the accusatory stage, could not be admitted as evidence even though the confession had been voluntarily made.

[4] Seldom has the meaning, legal bases for and limits of decisions of this court, been the subject of such intensive speculation and writings as have the *Massiah-Escobedo* decisions. The law journals even argue as to whether and to what extent the *Massiah-Escobedo* cases are grounded in the Sixth Amendment (rather than the Fifth Amendment), e.g., 49 Minn. L. Rev., 47, Nov. 1964; .... Ohio St. L.J. ...., Dec. 1964. The conflict in the cases and articles is set out at some length in the Petition for Certiorari of *Vignera*, this term, p. 16. This court has recently granted certiorari in several cases (*Vignera* v. *NY*, No. 397; *Westover* v. *U.S.*, No. 80, etc.), which apparently will decide the permissible limits of post-arrest interrogation in the absence of counsel.

It is admitted that Partin, during the Hoffa trial in the so-called Test Fleet case, acted as a government spy, reporting upon various defense activities to the prosecution, and as instructed, did report evidence of jury tampering activities. Inculpatory statements (denied by petitioners) as to jury tampering activities were testified to by Partin at the trial and are, in fact, the chief evidence upon which petitioner's conviction rests.

Even if Partin's activities would have vitiated any conviction in the Test Fleet case, the Sixth Circuit nonetheless held that no constitutional right was infringed by Partin's testimony in this case, contending that interference with counsel resulting from the intrusion of Partin only infringed upon Hoffa's rights to counsel in the Test Fleet case; that when Partin obtained incriminating statements as to jury tampering (a) no counsel was present and (b) that in any event if counsel participated in jury tampering, no privilege would attach to a person *particeps criminis* (even if counsel). Entirely ignored is the contention that Partin as a government agent obtained incriminating statements in the absence of counsel, and in violation of petitioner's Fifth and Sixth Amendment rights. The Sixth Circuit thus entirely misinterpreted or ignored the mandate laid down by the cases of *Massiah* v. *U.S.*, 84 S.Ct. 1199 (1964), and *Escobedo* v. *State of Illinois,* 84 S.Ct. 1758 (1964).[5] And it completely fails to come to grips with the Fourth Amend-

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[5] See also *Bram* v. *U.S.*, 168 U.S. 532 (1897), statement of sailor deprived of his clothing, in response to accusation that witness had seen him from the bridge of ship commit murder in a cabin, "He could not see me from there." excluded under the self-incrimination provision of the Fifth Amendment; and *Brock* v. *U.S.*, 223 F. 2d 681 (5th Cir., 1955), admission of bootlegger engaged in conversation by government agent while still asleep excluded.

ment (Search and Seizure) contention expressly reserved by this court in *Massiah* (at p. 1203).

The Sixth Circuit contends laboriously that Partin was not placed by the government in the midst of defense personnel,[6] and it appears that by such argument the Court of Appeals contemplated that the impact of *Massiah* might be blunted—i.e., Hoffa "voluntarily" invited Partin to join him. But this consideration can bear only on the question of waiver of the counsel/self-incrimination rights of petitioners. Without considering the correctness of their rationale, those cases, e.g., *Davidson* v. *U. S.*, 236 F. Supp. 264; *Goodchild* v. *Burke,* Wisc. Sup. Ct., 33 LW 2544), ruling that statements "freely and voluntarily" made to known police officers are not interdicted by *Massiah* are clearly inapposite here. No consential waiver can be implied where there is a fraudulent obtaining of access. Cf. *Fraternal Order of Eagles* v. *United States,* 57 F. 2d 93 (3rd Cir., 1932). Petitioner did not know that he was talking to a government agent when he was speaking to Partin. He, like Massiah, cannot, therefore, be said to have waived his right knowingly and intelligently, in view of the deception practiced. Mr. Justice Stewart's argument at 84 S.Ct. 1202-1203 is never the more true:

> "[5] . . . '*if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed*

[6] A reading of footnote 12 in the Sixth Circuit's opinion indicates that this conclusion is simply unimportant if not untenable. Partin, by telephone, initiated the discussion with Hoffa and requested (at a time after he was in contact with federal authorities for the purpose of cooperating with them) if he could meet with Hoffa in Nashville, ". . . I would like to get with you and talk with you . . ." (VI 2822a); "When can I see you?" (VI 2826a).

> *upon * * * because he did not even know that he was under interrogation by a government agent.'* 307 F. 2d at 72-73." (Emphasis added).

And even prior to the evolution of *Massiah-Escobedo* this court has deplored secret interrogation of persons suspected of crime, *Upshaw* v. *U.S.*, 335 U.S. 410, 412-413, quoting from *McNabb* v. *U.S.*, 318 U.S. 332 (1943), *Haynes* v. *Washington*, 373 U.S. 503 (1963).

In response to the anticipated argument that governmental investigation of crimes would be seriously hampered by the application of the rule in *Massiah*, Mr. Justice Stewart's thesis that investigation may be continued, that *only the incriminating statement obtained is excluded* (reserving Fourth Amendment considerations from such pronouncement) is equally persuasive here.

In *Massiah* the defendant was under indictment, and released on bail. In the instant case, petitioner and Hoffa were not under indictment for the jury tampering charge subsequently brought against them.[7] But

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[7] (a) In Massiah, the government agent who listened to the conversation via electronic devices testified, while in this case the agent obtained, and testified to, the statement directly, which fact we do not consider worthy of substantial comment. The testimony clearly would fall within the interdiction of Massiah so long as the inquisitor was in effect a "human bug" at that time acting for the government. Cf. *Russo* v. *New Jersey*, 33 LW 2621 (CA 3, 1965); (b) The location in which the statement was obtained in Massiah was the "agent's" automobile. More favorable to the defense position is the fact that here the locale was Hoffa's private quarters; and (c) While the inculpatory statements here were not the result of direct "question and answer," yet Hoffa and King were as much under interrogation as Massiah. By October 25, Partin initiated a discussion by reminding Hoffa that he had said he might want Partin "to pass something". (III 1366a, 1369a, IV 1628a-1629a). And it is plain that all statements extracted from Petitioner were the result of conversations initiated by Partin and which were tantamount to interrogation of Petitioner by him.

any contention that the absence of indictment is fatal to the petitioner's claim is dealt a heavy blow in *Escobedo, supra.* The key question posed is whether "the investigation is no longer a general inquiry into an unsolved crime *but has begun to focus on a particular suspect.* . . ." 378 U.S. at 490. This consideration was ignored by the Court of Appeals in its decision, Opinion, Fn. 12, p. 17-18. The Sixth Circuit recognized, however, that even before Partin came to Nashville the investigation had focused. "The government requested of Partin only that he report information of jury tampering. . . ." Ibid., p. 18.[8] *Arguendo* discounting this concession, nonetheless Partin's testimony was that the inculpatory statements were made over a several week period—the later statements thus were undeniably extracted at a time after the investigation had focused on these suspects. *In fact, the first inculpatory statement of petitioner testified to by Partin occurred on October 26—after the trial judge in the Test Fleet case had already been informed of tampering efforts as reported by Hoffa to Partin on October 25, and the F.B.I. was already carrying out an in-depth surveillance of petitioner.*[9]

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[8] Even before Partin came to Nashville, Walter Sheridan, an assistant to Robert Kennedy, instructed him to investigate jury tampering activities while he was stationed in Hoffa's defense camp. Both prosecutor Neal (III 1187a) and witness Partin (IV 1709a) stated that Mr. Partin "was sent in" expressly for the purpose of obtaining jury tampering evidence.

[9] By Oct. 22, 1962, the first day of the Test Fleet trial in Nashville, Partin had given a detailed report, according to his testimony, indicating intensive and extensive efforts by defendants to "reach a juror." Prior to Oct. 26, the F.B.I. was conducting a surveillance of King and on Oct. 27 those agents observed King go to the home of Oscar Pitts. The inculpatory statements testi-

The surreptitious extortion of the incriminating statement from an unsuspecting suspect after focus is the gravamen of the complaint. True there had been an arrest in *Escobedo* and the defendant was in custody. But, the fact that the defendant was not in custody, although arrested prior thereto, made no difference in *Massiah*. On balance, however, it appears that the prior arrest would be a factor militating in favor of admission of the testimony if the surreptitiousness in the obtaining of the incriminating statement is the gist of the complaint, for the prior arrested defendant would be more likely to be aware of the importance of making no incriminating statement. *Massiah, supra.* Where, as here, the defendant is totally unaware of an investigation, and the government seeks to elicit statements from him, it is the more important that those rights be protected. *The police choice to delay in making an arrest should not be the deciding factor in the determination of the time when right to counsel attaches, else the right would become extant only when the prosecutive forces determine to give it vitality.*

Dependent on the result in the *Vignera-Westover* series of cases in this court, had Partin disclosed his role as a double agent, the statements made by petitioner would have apparently been barred. *Russo* v. *New Jersey, supra.* Yet, a rule that a self-incriminating statement made to a known police officer is inadmissible into evidence but the same statement made to the same officer acting surreptitiously is admissible, is incongruous.

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fied to by Partin as regards petitioner occurred on Oct. 26, Oct. 30, Nov. 5, Nov. 7, Nov. 14 and Nov. 19. Inculpatory statements affecting petitioner were made by Hoffa (in which he chastised petitioner for lack of success), according to Partin, were made on Nov. 5, Nov. 14, again on Nov. 14, Nov. 15 and Nov. 18.

In *Lopez* v. *U.S.*, 373 U.S. 427, Mr. Justice Harlan, speaking for the majority, and the Chief Justice in a concurring opinion, find that there was no error in admitting into evidence a tape recording made by an Internal Revenue agent of a bribe offer to him in Lopez's office. Both opinions stress the fact that while the recording was secretly made, no fraud was practiced by the government agent in his entry, i.e., *Lopez* was fully aware of the identity of the agent, as such, from the very moment of his appearance. The fraud practiced here would indicate, therefore, a contrary result than in *Lopez*. Moreover, the inculpatory statements testified to in this case fall within the ambit of the exclusionary rule hypothecated in the *dissent in Escobedo*. To what extent Mr. Justice Stewart's dissent is correct in its analysis of the rule which will evolve should be clarified by this court.

II

Should certiorari not be granted for the purpose of considering whether this case falls within the ambit of *Massiah* and *Escobedo*, the Fourth Amendment consideration expressly reserved by the Supreme Court in *Massiah* comes to the forefront. In that event, certiorari should be granted here for the reason of determining whether the Fourth Amendment rights of petitioner were infringed. Cf. *Fraternal Order of Eagles* v. *U.S.*, 57 F. 2d 93 (3rd Cir., 1932); *Gouled* v. *U.S.*, 255 U.S. 298 (1921); *Wong Sun* v. *U.S.*, 371 U.S. 471, 484 (1963); *Amos* v. *U.S.*, 255 U.S. 313 (1921). See also *Lopez* v. *U.S.*, 373 U.S. 427, 437-438 (1963); *Wellman* v. *U.S.*, 227 F. 2d 757, 770 (6th Cir., 1955) (reversed 354 U.S. 931, 253 F. 2d 601 (1958); *Nueslein* v. *Dist. of Col.*, 115 F. 2d 690 (D.C. Cir., 1940).

In *Fraternal Order of Eagles* v. *U.S., supra,* the officers posing as members of another Eagle lodge gained entry and noted illegal sales of liquor. Invalidating the fruits of a search warrant subsequently issued based on the information learned during the fraudulent visit, the Third Circuit found that "A search and seizure following an entry by means of fraud (or) stealth . . . are unreasonable and violate the Sixth Amendment . . . If the procedure of the agents in this case may be practiced by government officials, then no home in the land is safe and the Fourth Amendment fails . . ." at p. 94.

Clearly, by the express reservation of Fourth Amendment considerations in *Massiah,* this court has cast grave doubt upon the present vitality of *On Lee* v. *U.S.,* 343 U.S. 747. The direct attack of Mr. Chief Justice Warren on the vitality of that case in *Lopez, supra,* as well as the comment of the *Lopez* majority ("Davis was not guilty of an unlawful invasion of petitioner's office . . ." at p. 438), *together with the reservation in Massiah* clearly dictate an early examination of the impact of the Fourth Amendment upon the admissibility of inculpatory declarations made by suspects to secretly acting government agents, especially where, as here, the confidence of the suspect is fraudulently obtained for the very purpose of obtaining such evidence. See dissenting opinions in *On Lee, supra,* of Mr. Justice Douglas (". . . every unjustifiable intrusion by the government upon the privacy of the individual whatever the means employed must be deemed a violation of the Fourth Amendment," at 72 S.Ct. 977), Mr. Justice Burton (". . . The Fourth Amendment's protection . . . is not limited to the seizure of tangible things." Ibid.); and of Mr. Justice Frankfurter at

975. Mr. Justice Black in separate dissent urged reversal under the supervisory authority of this court, at p. 974.

The interplay of the rights created by the Fourth, Fifth and Sixth Amendments protecting "the privacies of life," and the extent of the intimate relationship between them is a serious unanswered question, see Petition for Certiorari in *Vignera, supra*, pp. 21-22. Surely these amendments give as much protection to a defendant under secret interrogation as to one obviously and fully aware of his precarious position.

(2) THE DELIBERATE AND REPEATED CALLING OF THE JURY'S ATTENTION TO PETITIONER'S INVOCATION OF HIS FIFTH AMENDMENT RIGHTS BY THE PROSECUTION

Prosecutor Hooker thrice called to the jury's attention petitioner's refusal to testify in the inquiry held during the Test Fleet case by the presiding judge therein. A simple review of the facts demonstrate that this was deliberately done in a manner so as to make it brutally plain that he intended to make a mockery of this court's ruling in *Stewart* v. *United States*, 366 U.S. 1 (1961).

On cross-examination of King, the prosecutor asked if he had not "taken" the Fifth Amendment at that hearing. Despite the fact that an objection to the question was sustained, the same prosecutor when cross-examining Hoffa asked if Hoffa at the aforesaid hearing had not signalled King to take the Fifth Amendment. Although an objection was again sustained, the prosecutor nevertheless continued to examine Hoffa along the same line. In rebuttal summation, the prosecutor once more referred to the matter, simultaneously misrepresenting to the jury that King

had testified that "he took the Fifth Amendment." (*Supra,* p. 14). King never as such referred to the "Fifth Amendment."

It is clearly the holding of this court that when a defendant takes the stand a mistrial is required if on cross-examination he is so much as asked the question whether he had in a prior proceeding invoked the Fifth Amendment. *Stewart* v. *U.S., supra; Grunewald* v. *U.S.,* 353 U.S. 391 (1957). In fact, in *Stewart,* the question was, "Willie, you were tried on two other occasions. This is the first time you have gone on the stand, isn't it, Willie?" The reply was unresponsive, and in fact could be interpreted as a negative reply. Nonetheless, this court reversed the conviction holding that a mistrial motion made after the answer had been given should have been granted. It is thus plain error merely to call to the jury's attention the fact that the witness had invoked the privilege, *Johnson* v. *U.S.,* 318 U.S. 189 (1943).[10]

The prosecutor's conduct in the instant case presents a highly aggravated version of *Stewart.* The repeated question by the prosecutor directed at calling to the jury's attention petitioner's prior invocation of his constitutional right, despite the court's exclusionary rulings demonstrate a plain, planned and deliberate attempt by the government to make capital out of the

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[10] The exception recognized in both *Grunewald* and *Stewart* (based on *Raffel* v. *U.S.,* 271 U.S. 494 (1926) that cross-examination is permissible if the prior claim is inconsistent with the trial testimony is not apposite, i.e., King had not remained silent in the face of testimony that he had made guilty admissions (*Stewart*) and though exculpatory the testimony contains a potentially incriminating admission (*Grunewald*) in that King's testimony admits a meeting with Paschal.

petitioner's refusal to testify, cf. *Namet* v. *U.S.*, 373 U.S. 179; 83 S.Ct. 1151, 1156 (1963), the culmination of which comes in the rebuttal argument of prosecutor Hooker. He, disregarding the court's having repeatedly sustained objections to this line of questioning, argues to the jury that King had testified that "He took the Fifth Amendment."

The two grounds relied on by the Sixth Circuit for refusing to reverse (App. A), are palpably unsound. The first was that, "King, in his direct testimony, indicated that he did resort to his privilege not to testify." King's direct testimony was to the effect that he had accepted the option, tendered to him by Judge Miller, not to testify (*supra*, p. 13); *he did not mention the Fifth Amendment, and a lay jury would not have gathered from King's testimony that his choice of silence had been in exercise of his constitutional privilege. More important, his direct testimony on his silence was innocuous.* It in no way tended to help him, or to injure the government's case. It, therefore, could not give the government a license to engage in a malignant retaliation. The basic principle of *Stewart* and *Grunewald* is that a defendant's prior resort to his Fifth Amendment privilege cannot be used to his prejudice. Since the attenuated reference to the subject on direct examination in no way advanced King's credibility or his version of the events, it raised nothing which the prosecution needed to rebut and create no justification for a prosecution reprisal. Under the circumstances, the prosecution's exploitation of this indiscretion to the harm of the accused did exactly what *Stewart* and *Grunewald* forbid.

The second ground advanced by the court below was that, "In any event, the [trial] Court instructed the jury to disregard it." This ground is unsound for three reasons:

(1) *Stewart* makes it plain that a cautionary instruction cannot cure the prejudice of prosecution reference to a defendant's prior use of the Fifth Amendment, 366 U.S. 1, at p. 10; that the defense record is protected by a motion for a mistrial; that not only is it unnecessary to request a cautionary instruction, but such an instruction might increase the prejudice.[11]

(2) One can hardly imagine a more feckless caution than that which was given here. After denying the defense motion for a mistrial, and the brief arguments of defense counsel thereon the trial court stated: "Disregard the argument of counsel in that respect. Proceed, gentlemen. Stay within the record." Even assuming that the jurors understood that they were being cautioned, which "argument" of which counsel were they to disregard? The jurors could well have understood that they were to disregard only the defense arguments in "respect" to the motion for a mistrial.[12]

(3) Finally, no cautionary instruction of any kind was given when the prosecution asked the objection-

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[11] In any event, the prosecution's misconduct here was so repeated and aggravated that no cautionary instruction could have neutralized it. (Cf. *DeLuna* v. *U.S.*, 308 F. 2d 140 (1962), rehearing denied 325 F. 2d 375; *Horton* v. *U.S.*, 317 F. 2d 595 (1963).

[12] Underscoring the prejudicial misconduct of the prosecution is the comment of prosecutor Hooker immediately following the would-be cautionary instruction of the court during summation. Said Mr. Hooker, "Well, I will express it this way and I want it to be in deference to his Honor's ruling, there is no proof in the record that he made any answer."

able questions on cross-examination of King and Hoffa. Yet even if a cautionary instruction would have sufficed, it would have had to be given when the prejudicial incident occurred on cross-examination and not merely during the summation. Cf. *White* v. *United States,* 314 F. 2d 243 (1962).[13]

Courts have been and should be vigilant in the protection of the defendant's rights against oblique and ingenious methods devised by prosecution to obviate the impact of the rule in *Stewart, supra; U.S.* v. *Curtiss,* 330 F. 2d 278 (1964); *Sterling* v. *U.S.,* 333 F. 2d 443, 449 (1964). The rule becomes entirely meaningless if the prosecution may make reference to, or obliquely call attention to, the defendant's previous invocation of the Amendment. The Sixth Circuit in this case thus carves out two exceptions severely restricting the *Stewart case,* i.e., (1) that if there is

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[13] Since Hoffa was charged only as an aider and abettor of King, he could not be convicted on this count—as the trial court correctly instructed the jury (VII 3145a)—unless King was found guilty. *Shuttlesworth* v. *Birmingham,* 373 U.S. 262 (1963); *Edwards* v. *United States,* 286 F. 2d 681 (5th Cir., 1960). Reversal as to petitioner thus requires reversal as to Hoffa on this count. Moreover, since evidence of guilt of one offense in a common scheme is relevant evidence of guilt of another offense in the same scheme, *Nye & Nissen* v. *United States,* 336 U.S. 613, 618 (1949); *Heike* v. *United States,* 227 U.S. 131, 145 (1913); *Brehm* v. *United States,* 196 F. 2d 769, 771 (D.C. Cir., 1952); 20 Am. Jur., p. 296 (the opinion below recognized that evidence admissible against Hoffa on any one count of the indictment was also admissible against him on every other count) (App. A opinion, p. 27), reversal of Hoffa's conviction on count three is also required; and since the government's theory featured Hoffa as the master-mind and beneficiary of a single plot to fix the jury, it would appear petitioners Parks and Campbell, who were convicted only on Count Three, were also prejudiced by the erroneous convictions on Count Five.

reference in direct testimony, however innocuous, to the prior invocation of the privilege *Stewart* disappears, and (2) a cautionary instruction to disregard the prosecution reference, however feckless, obviates the prejudice notwithstanding that the very colloquy necessary to obtain the instruction must underscore in the mind of the jury exactly what *Stewart* forbids. In sum, the vitality of *Stewart* must perforce be entirely sapped by the rule adopted in this case by the Sixth Circuit if not reversed by this court.

(3) THE COURT INDULGED IN OVERPROTECTION OF THE INFORMER PARTIN THE EFFECT OF WHICH WAS TO DENY PETITIONER A FAIR TRIAL

As has been demonstrated, the key witness whose testimony fashioned conviction here was Edward Grady Partin. The trial court treated Mr. Partin, an admitted and paid government informer, in a most unusual fashion, shielding him again and again from impeachment efforts and virtually placing complete trial control in the hands of Partin and the prosecution, if not in Partin's alone.

The errors of the court are manifest:

(a) The court not only unduly restricted the cross-examination of Partin,[14] but went so far as to allow

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[14] Full cross-examination of a witness is an absolute right of the party against whom such witness is called. *Dist. of Col.* v. *Clawans*, 300 U.S. 617 (1937); *Alford* v. *U.S.*, 282 U.S. 687 (1931); *Sunderland* v. *U.S.*, 19 F. 2d 202 (8th Cir., 1927); *U.S.* v. *Augustine*, 189 F. 2d 587, 590 (3rd Cir., 1951); *U.S.* v. *Fontana*, 231 F. 2d 807, 810-812 (3rd Cir., 1956). In *Rossi* v. *U.S.*, 9 F. 2d 362, 366 (8th Cir., 1925), the Court in reversing stated with respect to an important government witness; "There should be wide latitude allowed in the cross-examination of West under these circumstances."

Partin to be the judge of the relevancy of answers. In this respect, the court clearly abdicated its function, and to a clearly biased witness at that. It is clearly the duty of a court to rule on such questions, e.g., *Lopez* v. *Valdez*, 32 R.I. 644.

(b) The court precluded the introduction of impeaching testimony by Reynolds (that Partin sought perjured testimony to substantiate his testimony. Extrinsic evidence is admissible of conduct of a witness indicating interest, bias or hostility, *Comer* v. *Pennsylvania R.R.*, 323 F. 2d 863 (2d Cir.); *Ewing* v. *U.S.*, 135 F. 2d 633, 641-42 (D.C. Cir.); *U.S.* v. *Beekman*, 155 F. 2d 580 (2d Cir.). Reynolds' testimony was clearly admissible under this rule, and its exclusion was an error of incalculable prejudice. Similarly, the exclusion of testimony by Fox (that Partin was carrying on illicit activities with government consent), and by Mrs. Partin (that Partin, as a dope addict, was completely incapable of belief),[15] were unwarranted infringements on impeachment.

(c) the actions of the prosecutor and the rulings of the court prevented cross-examination of Partin in the one area where the conflict of Partin's testimony with that of Hoffa could be resolved by independent evidence. There can be no doubt that the prosecution knew Partin was testifying falsely when he claimed that Hoffa had invited him to Nashville—rather than telling the truth, i.e., that Partin had virtually begged Hoffa to see him. The prosecutors knew this from the tape recordings in their possession, and which they

[15] The proffered testimony was that Partin told his wife, "I am not responsible for the difficulties that I am in and the way I am acting. It is due to drug addiction." (V 2500a).

deposited with the court. Their clear duty was to correct the false testimony of a government witness, *Alcorta* v. *Texas,* 355 U.S. 28, *Napue* v. *Illinois,* 360 U.S. 264. A prosecutor who uses false testimony "as a means and contrivance to secure a conviction" engages in a deliberate deception of the court and jury in violation of the Fifth Amendment's due process clause, *Hawk* v. *Olson,* 326 U.S. 271; *White* v. *Ragan,* 324 U.S. 760; *Pyle* v. *Kansas,* 317 U.S. 213 (Fourteenth Amendment); *Mooney* v. *Holohan,* 294 U.S. 103. Had the court permitted the recall of Partin, the vice might have been corrected, cf. *Napue* v. *Ill., supra,* but this the court refused to do. The suppression, or concealment of evidence which should be available, is fatal to the due process requirement. Moreover, failure to produce the recordings and transcriptions for use on cross-examination of Partin violated the Jencks Act, 18 U.S. Code 3500, even if later produced. Perhaps, when Partin spoke to Hoffa over the phone, he was not making a statement "to an agent of the Government." But when the recordings and transcriptions were delivered to the government, the prior oral expressions were thereby "made to an agent of the government." The situation is the same as in the case of a government investigator who testifies concerning his interviews with the defendant. The witness' memoranda and notes of these interviews are producible as Jencks Act statements. *Clancy* v. *U.S.,* 365 U.S. 31; *Campbell* v. *U.S.,* 365 U.S. 85; *Bradford* v. *U.S.,* 271 F. 2d 58, 65-69 (9th Cir.). And the requirement of "contemporaneous" recording is satisfied even if the statement sought to be produced is a later transcription of an earlier recording. *Palermo* v. *U.S.,* 360 U.S. 343, 351-52; *Campbell* v. *U.S.,* 373 U.S. 487.

Similarly, a previously written statement by a witness becomes a Jencks Act statement when delivered by the witness to a government agent as his statement. Permitting the recording of the conversation by Partin and/or the furnishing of the tapes by Partin to the government brings these recordings within the intent of the Act, cf. *Palermo* v. *U.S., supra; Campbell* v. *U.S., supra,* for the intention of that Act was to give statutory approval to the principles of *Jencks* v. *U.S.,* 353 U.S. 657.

(d) The court refused to give a cautionary instruction on the use of an informer's testimony. The Sixth Circuit's ruling in this respect seems to conflict with the rule of other circuits and this court. *District of Columbia* v. *Clawans,* 300 U.S. 617, 631 (1937); *On Lee* v. *U.S.,* 343 U.S. 747 (1952); *Fletcher* v. *U.S.,* 158 F. 2d 321 (1946); *Cratty* v. *U.S.,* 163 F. 2d 844 (1947); *U.S.* v. *Masino,* 275 F. 2d 129 (1960); *Orebo* v. *U.S.,* 293 F. 2d 747 (1961); *Todd* v. *U.S.,* 345 F. 2d 299 (1965).

The importance of this court's striking down this unwarranted type of overprotection in the exercise of the supervisory power of this court is manifest. Simple error in any one instance alone is not the vice here. What is created by the trial court here is a course of trial in which impeachment efforts are permitted to proceed so far and no further. The effect upon a jury of such a course of manifest and tender concern by the trial judge preventing the destruction of a witness can only have the effect of placing the stamp of judicial approval upon the testimonial veracity of the witness. This result alone is clearly abhorrent.

But perhaps even more important is that it bespeaks of an encroachment which in effect limits the defense

from striking home the final nail which would change the collective mind of the jury from one of crediting to discrediting a witness, from a verdict of guilty to innocent. Especially is this true in cases involving figures of great public unpopularity and subject to intense disapprobation. The limitation of a defense in such instances, as here, is not only denial of fair trial, but it contaminates our entire judicial system.

(4) OTHER REASONS FOR GRANTING THE PETITION

In conformity with the statement of facts adopted hereinbefore by reference from the statements made in the petitions for certiorari by petitioners Hoffa, Campbell and Parks, petitioner likewise incorporates herein by reference as it is set out in full therein the reasons assigned in such petitions for the granting of the said petitions; reiterating that the reasons which he would assign, were such reasons set forth at length herein, rather than by incorporation, would not materially differ from those set forth in the petitions of such other petitioners. (Questions 4-17 this Petition).

Respectfully submitted,

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15,879

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

EWING KING, *Defendant-Appellant.*

BEFORE: WEICK, Chief Judge, MILLER and CECIL, Circuit Judges.

Judgment

APPEAL from the United States District Court for the Eastern District of Tennessee

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.
CARL W. REUSS
Clerk

A True Copy.

Attest:

.....
CARL W. REUSS, *Clerk*

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